IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

CRL.A.No. 625 of 2004

(AGAINST THE ORDER DT. 3/3/04 IN SC NO. 93/2001 OF THE FILES OF ADDL. SESSIONS COURT, MANJERI)

APPELLANT: IST ACCUSED.

ALAVI, S/O.KUNJAHAMMED KURIKKAL,
ORUVAMPURATH HOUSE, KILLIKODE, THUVOOR.

BY ADV. SRI.P.SAMSUDIN

RESPONDENTS: COMPLAINANT.

STATE OF EKRALA, REP. BY THE CIRCLE INSPECTOR OF POLICE, PANDIKKAD THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.C. SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/09/2007, THE COURT ON 10/10/2007 DELIVERED THE FOLLOWING:

J.B. KOSHY & K.HEMA, JJ.

Crl. Appeal No. 625 of 2004

Dated this the 10th day of October, 2007

Judgment

Koshy,J.

Accused, two in number, was charge-sheeted for offence punishable under section 302 and 189 read with section 34 of the Indian Penal Code for alleging murdering one Aleema, sister of the first accused. Second accused is the father's younger brother of A1 and deceased. PW1 Amina is the sister of A1. PW11 Aisha is another sister of A1 and deceased. A1 had three other brothers also. Deceased, PW1 and accused were living in the tharawad house with the mother. Motive for the crime, alleged by the prosecution, is gifting of some landed property to the deceased by her father. According to the prosecution, father had assigned 55 cents of property to Aleema to the consternation of Alavi and his three brothers. They had made every attempt to thwart the endeavour of the old man to assign property to the daughters, but, could not succeed. Alavi had strongly resented the act of his father giving property to Aleema

and he had declared that Aleema would not be permitted to enjoy her property. On14.2.1999 Aleema brought Firoz (PW10) and Subramanian (PW2), her co-workers in a brick kiln, for doing some work in the property assigned to her. In the morning, A1 Alavi and A2 Hamza Kurikkal came and made an unsuccessful attempt to disrupt the work done by Firoz and Subramanian. At about 4.00 p.m., Alavi and Hamza Kurikkal came there and had a wordy altercation with Aleema who was supervising the work. As instigated by Hamza Kurikkal, Alavi came near Aleema, hold her neck, whipped up a knife and stabbed her on the neck. Thereafter, Alavi felled Aleema down, pinned her to the ground pressing his right knee on her chest. Alavi brandished the knife towards Firoz and Subramanian and threatened them to cause their death if they refused to leave the place. They scampered and Alavi slit his sister's throat with the knife. Ameena (PW1) who came out of the house for ablutions for the prayer saw the incident. She went to the police station situated nearby and gave Ext.P1 F.I. statement. Consequently, Ext.P1 (a) F.I.R. was registered. PW15 Circle Inspector of Police conducted inquest on the body, seized the material objects including MO1 knife, searched the house of

accused and recovered the blood stained cloths (MOs 2 and 3) of A1, arrested the accused, questioned the witnesses and recorded their statements. PW16 Circle Inspector of Police completed investigation and filed final report.

2. PW9 doctor conducted autopsy on the body of Aleema on 15.2.1999 and issued Ext.P10 postmortem certificate. He has noted the following injuries in Ext.P10:

> "1. Incised wound 3.8 x 0.3 c.m. back root of neck slightly oblique upper inner and 1 c.m. left of mid line. 1 c.m. behind the upper inner end on the lower margin. Another incised wound extended downwards and inwards 2 x 0.3 c.m. x 4.5 c.m. muscle plane for 4 c.m. Both ends sharp.
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> 2. Incised wound 5.2 x 0.6 c.m. right side of face, superficial both and sharp on the jaw border right side, back end on the angle of jaw (bevelled downwards).
>
> 3. Incised wound 7 x 1 to 2 c.m. right side of neck back end 5.5 c.m. below ear, lobule, front end 1 c.m. below chin 0.5 c.m.right to mid line stissue deep.
>
> 4. Incised wound 5.5 x 0.1 x 0.5 c.m. right side of neck oblique upper end 0.8 c.m. below middle of injury No.2. The upper half was superficial and lower half 1 c.m. deep.
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> 5. Incised wound 12 x 5 c.m. front and sides of neck both ends sharp cut left end 1 c.m. below ear lobule and the upper margin on the jaw border with bewelling downwards. Right end 10.5 c.m. below ear lobule. On

the right side, 2 c.m. below the upper margin, there was a side cut for 1 c.m. and on the left side 1.5 c.m. below the upper margin had a side cut for 1 c.m.

6. Incised wound 9 x 1 c.m. mid line on the root of neck.

7. Superficial incised wound 2 x 1 c.m. right side of top of chest 8 c.m. outer to mid line.

8. Superficial incised wound 1 x 0.5 c.m. x 1 c.m. outer to injury No.7 in the same line (top of chest).

9. Four contused abrasion 0.5 x 0.5, 0.8 x 0.5, 0.8 x 0.8 c.m. and 1 x 0.8 c.m. from above downwards at a distance of 0.3 c.m., lower one 2 c.m. above injury No.8 on the right side of chest.

10. Abraded contusion 6 x 5 c.m. on the shoulder front and outer aspect.

11. Superficial linear abrasion 12 c.m. oblique front of upper arm to forearm outer lower end 18 c.m., above wrist. On the outer margin.

12. Incised wound 1.5 x 0.5 x 0.5 c.m. middle of front of terminal phalanx right ring finger.

13. Incised wound 1 x 0.5 x 0.5 c.m. at the distal interphalangeal joint of middle finger right side.

14. Incised wound 0.5 x 0.3 x 0.3 c.m. middle front of terminal phalanx of index finger right.

15. Incised wound 2 x 0.4 x 0.4 c.m. inner aspect of middle of right thumb.

16. Incised wound 1 x 0.5 x 0.5 c.m. in the wep space of index and thumb 4 c.m. below root of index finger right side."

Underneath the external injuries 5 and 6 mentioned in the postmortem certificate, trachea, oesophagus muscles and vessels were cut and retracted. The cartilage between cervical vertebrae 3rd. 4th showed a cut injury for 1 c.m. The opinion of the doctor as to the cause of death is that the deceased died due to cut injury to the neck. When he was in the box, he was shown the MO1 knife. He stated that the injuries found on the person of the deceased could be caused with a weapon like mO1. The testimony of PW9 coupled with the postmortem certificate would clearly establish that the deceased died due to cut injury to the neck.

3. Prosecution examined PW1, sister of the deceased, who gave Ext.P1 first information statement, PWs 2 and 10, colleagues, employed by the deceased in her property given by her father, as occurrence witnesses, but, all those witnesses stated that they have not seen the actual murder. The court relied on circumstantial evidence coupled with contradicted parts of depositions and evidence given by PWs 1, 2 and 10 though declared

hostile. According to the trial court, the following facts are established by evidence:

> "1. The brothers of Aleema had made attempts to thwart the idea of giving properties to the sisters. Ext.P3 would clearly establish that.
>
> 2. That A1 was nurturing ill-will against Aleema because of the assignment of property in her favour. The evidence of PW11, another sister establishes that.
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> 3. The brothers could not countenance assignment of property to the deceased. PWs 6 and 7 village officers could not complete the work of measurement because of the stiff opposition of the brothers on the previous day.
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> 4. PWs 2 and 10 admitted their presence at the site on the fateful day. PW2 testified that without completing the work he returned. PW10 testified that he saw A1 felling Aleema on the ground. A1 whipped up a knife threatened him and PW2 with dire consequences and they scampered. PW10 had heard agonised cry from behind while they were fleeing.
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> 5. The weapon used to slit the threat of Aleema was recovered from the place of occurrence.
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> 6. PW10 identified all material objects including the knife and wearing apparels of A1.
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> 7. The Investigating officer recovered the blood stained both towel from the parapet of the well.

> 8. The Investigating officer recovered blood stained shirt and lunki of A1 from the house."

4. According to the learned Sessions Judge, the above factors point out to the guilt of the first accused and first accused (appellant) alone. There was no evidence regarding the role of second accused. Before analysing the evidence adduced in the case, we may refer to the defence adduced by the accused. After the close of prosecution evidence, the accused were questioned under section 313 Cr. P.C. He denied having committed any offence. A1 filed a statement alleging that he was living with his mother and the deceased in the same house, that he was not nurturing ill-will against the deceased, that he is totally innocent, that he is unaware as to what happened on the fateful day and that he has no role in it. The shirt, lunki and both towel marked in this case do not belong to him. He has nothing to do with the knife produced by the prosecution. The witnesses Subramanian and Firoz are friends of the deceased and they have perjured in this court. The charge sheet was filed without proper investigation and without apprehending the real accused.

5. Considering the inquest report, injuries noticed in Ext.P10 postmortem certificate and deposition of PW9 doctor, it is not disputed that Aleema was murdered and cut injury on the neck was fatal. It is a clear case of homicide. PW9 doctor also deposed that antemortem injuries found in the body can be caused with a weapon like MO1 knife. Even appellant hasno case that it is not a case of homicide. The dispute is who caused the murder?

6. In every crime committed, there will be a motive for the crime. But, it is a difficult task for the prosecution to prove motive with precision. When there is direct evidence, proof of motive may become irrelevant. Here, since the alleged occurrence witnesses turned hostile, proof of motive is very important. Even in circumstantial evidence, failure of proving motive alone is not fatal, if there were all sufficient circumstantial evidence to prove the guilt of the accused beyond reasonable doubt. But, to kill a sister by the brother is not a simple thing and there will be adequate motive even though existence of a strong motive by itself is enough to convict the accused as guilty (See: State of MP and others v. Paltan Mallah and others - ((2005 (3)

SCC 169 para 9). Now, in this case, PW1, sister of the accused and deceased, who is not living in the tharawad has deposed that with regard to the assignment of the property in favour of Aleema by her father there was dispute between A1 and the deceased. A1 used to quarrel with the deceased in this regard. She has admitted that she had filed Ext.P3 petition before the police. The deceased and PW1 are also signatories to the petition. She testified that the police called the brothers and sisters to the police station to square up the matter. PW6 Vasudevan, Special Village Officer, PW7 Gopinathan, Additional Village Officer and PW8 Prabhakaran, Village Officer, Thuvoor have also given evidence with regard to the dispute between the deceased and her brothers. PW6 testified that Aleema had made an application for a site plan for securing a bank loan. PWs.6 and 7 went to the property on 13.2.1999, that is, the previous day of the incident, for measuring out the two plots given to Aleema by her father. However they could not complete measurements because the brothers of Aleema obstructed it. But, they stated that objection was made by all brothers and not the accused alone. PW8 Village Officer issued Ext.P9 to show that Aleema was having property as

deposed by the prosecution. But, evidence of PW11 is practically unchallenged and there was no serious cross examination. Evidence of PW11 also proved that A1 used to quarrel with the deceased regarding the property. We are of the opinion that motive is proved.

7. With regard to incident, prosecution examined PWs.1, 2 and 10 as occurrence witnesses. But, all of them became hostile. But deposition of a witness who was declared hostile and departure from his previous statement need not be discarded as such. When a prosecution witness depart from the previous statement, prosecution can be allowed to put questions to accused. Section 154 speaks of permitting a party to put to his own witness 'questions which might be put in cross-examination'. It is not necessarily tantamount to 'cross-examining' the witness. 'Cross-examination', strictly speaking means cross-examination by the adverse party as distinct from the party calling the witness. (Section 137, Evidence Act). That is why section 154 uses the phrase 'put any questions to him which might be put in cross-examination by the adverse party'. Therefore, neither the party calling him, nor the adverse party is, in law, precluded from relying on any part of

the statement of such a witness. It was held in in Bhe Ram v. State of Haryana (AIR 1980 SC 957) that the maxim 'Falsus in Uno Falsus in Omnibus' does not apply to criminal case and it is the duty of the court to separate the grain from the chaff instead of rejecting the same on the ground of contradiction. In Kalegura Padma Rao and another v. State of A.P. (2007 AIR SCW 1447) it was observed as follows at paragraph 13 and 14:

> "13. To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana ((2002) 3 SCC 76). Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of 'falsus in uno falsus in omnibus' (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim 'falsus in uno falsus in omnibus' has no application in India and the witnesses cannot be branded as liar. The maxim 'falsus in uno falsus in

> omnibus' has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but, it is not what may be called 'a mandatory rule of evidence'. (See: Nisar Ali v. The State of UP (AIR 1957 SC 366).
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> 14. The above proposition was elaborately discussed in Sucha Singh and another v. State of Punjab (2003 (6) JT SC 348) and Israr v. State of UP ((2005) 9 SCC 616)."

In Narayan Nathu Naik v. Maharashtra State (AIR 1971 SC 1656), Apex Court relied on the evidence of the prosecution witnesses who had partly resiled from their previous statements, to the extent they supported the prosecution, for corroborating the other witnesses. In Bhagwan Singh v. State of Haryana (AIR 1976 SC 202), a three member of the Apex Court relied on the hostile witness. Contention of the accused and answers given by the Apex Court are contained in paragraphs 7 and 8 of the judgment which is as follows:

> 7. In this case, the Public Prosecutor obtained permission from the Court to cross-examine P.W.Jagat Singh since he did not specifically refer to the two co-accused in his examination-in-chief. Mr.Debabrata Mukherjee, on behalf of the appellant,

> submits that since the prosecution case rests principally upon Jagat Singh's testimony, the whole edifice is destroyed on that witness being declared hostile and the appellant is entitled to an acquittal.
>
> 8. We have carefully perused the evidence of Jagat Singh, who was examined in the trial after more than a year of detection of the case. The prosecution could have even avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

In Sat Paul v. Delhi Administration (AIR 1976 SC 294), a two member bench of the Hon'ble Apex Court summarised the legal points as follows:

> "51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after

> reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto."

Relying on the decision of the Apex Court in State of UP v. Ramesh Prasad Misra and another ((1996) 10 SCC 360), the Apex Court in Gurpreet Sing v. State of Haryana (AIR 2002 SC 3217) held as follows:

> "20. Incidentally, it is now well-settled that in the event of a portion of evidence not being consistent with the statements given under 161 and the witness stands declared hostile that does not, however, mean and imply total rejection of the evidence. The portion which stands in favour of the prosecution or the accused may be accepted but the same shall be subjected to close scrutiny. It is in this context the observations of this Court in State of UP v. Ramesh Prasad Midsra and another ((1996) 10 SCC 360) seem to be rather apposite and the same is thus set out hereinbelow.
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> > "7. The question is whether the first respondent was present at the time of death or was away in the village of DW1, his brother-in-law. It is rather most unfortunate that these witnesses, one of whom was an advocate, having given the statements about the facts within there special knowledge, under section 161 recorded

> during investigation, have resiled from correctness of the versions in the statements. They have not given any reason as to why the investigating officer could record statements contrary to what they had disclosed. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but, it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. One clinching circumstance, viz., that PW2 and PW6 had heard some quarrels in the house of the respondents and the deceased was crying out, is not on record as substantive evidence. PW2 and PW6 had n regard for truth; they fabricated the evidence in their cross-examination to help the accused which did not find place in their sectin161 statements that they had seen one man of white complexion and aged between 30 to 35 years, going to the house of the deceased on the fateful night and leaving the house at 8.00 a.m. on the next day."

Similar view was taken in Gura Singh v. State of Rajasthan ((2001) 2 SCC 205).

8. It is true that deposition of hostile witness who change his version from the original version has to be viewed with suspicion as it can be said that such witness has no respect for truth. But, in some cases, discrepancy with the earlier statement may be

trifle or not serious. His version may not be totally unreliable and it may be partially reliable. It is for the court to find out the truth and parts of evidence of hostile witnesses also can be relied on, if it is corroborated by other evidence or it appears to the court that it is believable.

9. Now, we will come to the evidence of PW1. PW1 gave Ext.P1 first information statement. In the first information statement, PW1 has stated that her elder sister accused her mother and herself who were residing in the tharawad house. Deceased sister was married four times. She divorced and she is residing in the tharawad house with them. Her father's property was given on partition between her four brothers and elder sister deceased Aleema. Aleema was given 55 cents of property. On 14.2.1999, two persons came from the brick company where Aleema was working for doing some work in that property. Her brother, accused, had got enmity towards Aleema because father gave her 55 cents of property and accused used to say that he will not allow her to enjoy the property. While she was praying, she heard a sound and when she looked into, she saw that Aleema was being killed by the accused by cutting in the

neck. According to her, the incident occurred on 14.2.1999 at about 4.00 p.m. First information statement is seen given at 6.30 p.m. on the same day without any delay and reached the Magistrate's Court on the next day. She was examined as an eye witness, but, in court, she stated that she has not seen the incident. She stated that she saw the deceased lying with throat slit, but, she cannot say how it happened. She was declared hostile. She admitted her signature in Ext.P1 and stated that she has written in Ext.P1 that the statement was read by her 'മൊഴി വായിച്ചു കേട്ടു' in her own hand and signed the same, but, according to her what is written in Ext.P1 statement is not what is told by her. Police had asked to sign a paper after asking her to sign. She studied upto Xth standard and is literate. Even though she was cross-examined thoroughly, she took the stand that she has not seen the incident and police did not record her statement correctly. But, she deposed that when she looked hearing a sound, she saw Aleema lying dead and many persons were rushing to the spot. Exts.P2 to P2 (h) were marked by prosecution. It is true that first information statement is a very important piece of evidence, but, it is not a substantive evidence. If the

first information statement was recorded immediately after the incident, there is no time to the police to deliberately make a false person as accused as held by the Apex Court in Rachamreddi Chenna Reddy and others v. State of AP (AIR 1969 SC 994). That is the first version regarding the incident and it should be given due importance, as the earliest version of the incident given without tainted by any tutoring. The incident occurred at about 4.00 p.m. First information statement was given within two and a half hours, but, at the same time, Ext.P1 first information statement is not a substantive evidence. It can be used for corroboration or contradiction and also to show that the impleadment of the accused was not an after thought as held by the Apex Court in State of MP v. Surbhan (1996 Crl.L.J.3199). In cross-examination, she also stated that even after the murder, she is staying with the accused and she likes him. Prosecution cross-examined her. She denied the contents of the first information statement. She also stated that even though she stated that she saw Aleema lying dead, she never enquired who killed her sister. It is a strange conduct. Her evidence would only show that she gave Ext.P1 F.I. statement to the police at 6.30 p.m.

immediately after the incident and police started investigation without loosing any time. The police officer who recorded the F.I. statement also stated that the F.I. statement was correctly recorded and forwarded to the court. It cannot be stated that contents of the same is the result of an imagination of the police officer. It also shows that PW1 subsequently changed her version. Court also can presume certain facts under section 114 of the Evidence Act having regard to natural events and human conduct and first information statement given by a natural witness need not be ignored merely because the person who gave the first information statement became hostile (See: Khujji @ Surendra Tiwari v. State of MP - AIR 1991 SC 1853). It is argued by the prosecutor that she gave the correct version immediately after the incident according to the natural human conduct. But, evidence was taken after about seven years and she tried to save her brother who was living with her in the same house and her sister is anyway lost. The police officer who recorded the first information statement has done it in the official course of duty. The earliest version of the incident given by PW1 depicts the accused as the person who caused the death of Aleema,

but, since she has become hostile and denied the contents of Ext.P1 statement which was given by her, we are not accepting the contents in the FI statement as such though we are not ignoring it. The question is whether the allegation of prosecution is proved by other evidence.

10. Now, we will come to the evidence of PWs 2 and 10. PW2 in his deposition stated that he went there for working in Aleema's property. He also stated that he was working in cleaning the land where Aleema was working, but, he also became hostile and has opposed section 161 statement. In his cross-examination with permission, he deposed that he went there at 9.15 a.m. for fixing boundary as called by Aleema. They were having pick axe etc. They took food in the noon. Afterwards also, there was work and there was talk between Alavi and Aleema. He did not see A2. He deposed as follows:

> 'ഒരു ഞായറാഴ്ച ഞാനും ഫിറോസും അലീമയുടെ വീട്ടിൽ പണിക്കു പോയിരുന്നു. അലീമ ഞങ്ങളെ അതിരു മാടാൻ വേണ്ടി വിളിച്ചതാണ്. ഞങ്ങൾ 9.15 മണിക്ക് അവിടെ ചെന്നു. കയ്ക്കോട് പിക്കാസും വെട്ടുകത്തിയും ഉണ്ടായിരുന്നു. അവിടെ ഉച്ചക്കു ഭക്ഷണം കഴിച്ചു. അത് കഴിഞ്ഞ് പണിയുണ്ടായിരുന്നു. അലവിയും അലീമയും തമ്മിൽ അവിടെ സംസാരം ഉണ്ടായിരുന്നു. A2-വിനെ അവിടെ കണ്ടില്ല.'

In cross-examination by the accused, he deposed that he

did not hear the conversation of the deceased and A1. He also deposed that since there was some dispute, he immediately came back. His evidence would only show that he has not seen the actual incident, but, he went for work in Aleema's property with PW10 and he continued the work even after lunch and there was a wordy quarrel between the first accused and Aleema. So, at the maximum, this evidence will only help the prosecution to prove that at the time of incident there was presence of the accused and the deceased and there was wordy quarrel with them. PW10 was also with him. PW10 Firoz, is another co-worker. He went there to demarcate the boundary of Aleema as requested by Aleema. He also stated that he went to the property along with PW2 on 14.2.1999, a Sunday, as requested by the deceased Aleema for demarcating her property. He admitted having gone to the spot for demarcating the property. According to him, he and PW2 went there with coir rope as instructed by Aleema and when they started work, A1 came there. A2 had come there and instructed Aleema not to do any work there. When Aleema asserted that it was her property, A1 came and took away A2 from that place. PW10 and his friend took lunch and continued their work. At about 2.45 p.m., A1

came again and pushed Aleema down on the ground. He brandished MO1 knife and threatened PWs2 and 10 with dire consequences and he will kill both. So, he and PW2 ran away from the place. At that time, A2 was not there. When they were fleeing they heard an agonised cry from behind. He deposed as follows:

> "2.45 മണിക്ക് അലവി വീണ്ടും വന്നു. അലീമയെ പിടിച്ചു അലവി തള്ളിയിട്ടു. അലവി കത്തിയും കൊണ്ടു വന്നു ഞങ്ങളുടെ നേരെ വീശി. ഇവിടെ നിന്നാൽ രണ്ടു പേരേയുംകൊല്ലും. ജീവൻ വേണമെങ്കിൽ ഓടിക്കോ എന്നു പറഞ്ഞു .A2-വിനെ അവിടെ കണ്ടില്ല. ഞാനും PW2വും അവിടെ നിന്ന് ഓടി. കുറെ ഞങ്ങൾ ഓടിയപ്പോൾ ഒരു അലറുന്ന ശബ്ദം കേട്ടു. ഞാൻ തിരിഞ്ഞു നോക്കി. അലീമയെ നിലത്തുവീഴ്ത്തിയത് കണ്ടു. പിന്നെ ഒന്നും കണ്ടില്ല. ഞങ്ങൾ അവിടെ നിന്ന് ഓടി രക്ഷപ്പെട്ടു."

This witness has identified MO1 knife which was wielded by first accused. He has also identified MOs 2 and 3 shirt and lunki respectively worn by first accused when the incident took place. MO4 bath towel which was with A1 was also identified by him. The deceased was wearing MO5 maxi at that time. He has identified MO6 pick axe, MO7 spade and MO8 coir rope used by them for work. His case was in accordance with the case of prosecution. But, he denied his 161 statement that he has seen cutting of Aleema by the accused. Therefore, he was declared hostile. His examination would prove that he went along

with PW2 for work. There was dispute between the deceased and accused regarding the property. Because of the objections raised by the accused, they were not able to complete the work or measurement. He specifically stated that the deceased brandished PW10 and PW2 with MO1 knife and that is why they ran away. The entire case of the prosecution was proved by PW10 except the fact that he actually saw the causing of murder. If we believe the deposition of PW10 even if he actually did not see slitting of throat which is an embellishment made by police, we are of the view that appellant cannot escape conviction. The trial Judge who saw the demeanour of the witnesses believed the acceptable part in accordance with the prosecution. observed that that part was not stated in accordance with previous statement because of some extraneous consideration only. Even if he was not declared hostile and his evidence in chief can be admitted, prosecution has made out a case against A1. In any event, evidence of PW10 would show that there was dispute between the deceased and accused regarding the property gifted by their father and PWs 2 and 10 went for work for fixing the boundary and accused obstructed the work. It is only A1 who threatened them and brandished

them by MO1 knife. He threatened that he will kill her unless they go away. A1 was identified by him. MOs 2 and 3 shirt and lunki worn by the accused was also identified by him. MO4 bath towel of A1 etc. were identified by him. Even though PW10 was declared as a hostile witness, he was cross-examined well by the prosecutor as permitted by the court. Merely because PWs 2 and 10 were working along with Aleema is not a ground for disbelieving their version as there is no case for the defence that they were inimical towards the accused on any ground or they are interested witnesses.

11. The investigation in this was conducted by PWs 15 and 16 Circle Inspectors. PW15 conducted inquest on the body and prepared Ext.P5 inquest report. He seized MO1 knife, MO5 maxi, MO6 pick axe, MO7 spade, MO8 rope, MO9 series skirt, scarf and brassiers of the deceased, MO10 purse and MO11 series grass, dry leaves and soil under the inquest report. As pointed out by PW1, he recovered MO4 bath towel of A1 from the parapet of the Well. The prosecution case is that after slitting the throat of Aleema A1 washed his hands and face drawing water from the Well and at that time MO4 bath towel was with him. The investigator after sending Ext.P13 to the

court, searched the house of the accused and seized the blood stained MO2 shirt and MO3 lunki, which A1 was wearing at the time of the incident as identified by PW10, from a room by the side of the verandah. MOs 2 and 3 were recovered under Ext.P6 search list which is attested by PW3 Joy and PW5 Mathew. Even though they were also declared hostile, these witnesses have testified that they saw the Circle Inspector searching the house and they have signed Ext.P6 search memo. We also note that MO1 knife, MO6 pick axe, MO7 spade etc. were identified by PW10 also. He specifically stated that he saw MO1 knife with the accused and with that knife they were chased away. MOs 2 and 3 which were recovered from the house of the accused was also identified by PW10 as the one which were used by the accused at the time of the incident. Ext.P17 certificate of chemical analysis shows that MOs 1 to 4 were found blood stained. There was no contention that the investigating officers were against the accused. In the ordinary course, they have conducted the search in their official duty and MOs 2 and 3, shirt and lunki, were found from the house of the accused. There is no reason for believing the evidence of investigating officer in

this regard (See: State of Kerala v. M.M. Mathew - AIR 1978 SC 1571). Here, identification by PW10 as the dress worn by the accused at the time of incident is corroborated by the evidence. Accused has no explanation how the dress has got blood stained. There is no reason for the presence of MOs 2 and 3 blood stained dress in his house, if it is not owned by him. In any event, evidence of PWs 2 and 10 would show that the accused was there at the time of incident and he was objecting measurement by PWs 2 and 10. According to the evidence of PW10, accused used MO1 knife for brandishing them. Doctor certified that the fatal injury can be caused by a weapon like MO1. The totality of circumstances proved the prosecution version. Considering the totality of evidence, we are of the opinion that no interference is required in the conviction and sentence passed by the court below. Appeal dismissed.

J.B.KOSHY
JUDGE

K. HEMA
JUDGE

vaa

J.B. KOSHY AND
K.HEMA,JJ.

Crl. Appeal No.625 of 2004

Judgment

Dated: 10th October, 2007